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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-505

ROBERT EUGENE BETTA and RAYMOND L. NG,
Petitioners,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the Court of Appeal of the State of California, First Appellate District, Division One

OPINION BELOW

The opinion of the Court of Appeal of the State of California for the First Appellate District, certified not to be published in the official reports, is appended to the Petition pp. i-v.

JURISDICTION

The jurisdiction of this Court is conferred by Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Whether overhearing from an outside stairwell a conversation taking place within an apartment violates the occupants' reasonable expectation of privacy?

2. Whether the temporary detention of a person several minutes to determine if he is involved in specific criminal activity violates the subject's constitutional right to be free from an unreasonable invasion of privacy?

STATEMENT OF THE CASE

On June 18, 1971, the San Francisco District Attorney filed an information in superior court charging petitioners in count one with violation of California Penal Code section 337a(2) (keeping or occupying a place with paraphernalia for the purpose of recording wagers); in count two with violation of California Penal Code section 337a(4) (recording wagers); and in count three with violation of California Penal Code section 337a(6) (accepting wagers). (CT 1-2). On June 30, 1971, petitioners were arraigned on the above charges and entered pleas of not guilty (CT 3). On August 24, 1971. petitioners filed motions under California Penal Code sections 995 and 1538.5 to set aside the information and sup-

press evidence (CT 28). On August 27, 1971, a hearing was held on these motions and the suppression motion was submitted on the basis of the preliminary hearing transcript and additional testimony (CT 32). On September 7, 1971, both motions were denied (CT 34). On that same date petitioners withdrew their former pleas of not guilty and entered pleas of guilty to count one of the information, and counts two and three were dismissed on the district attorney's motion (CT 35).

On October 1, 1971, petitioners were arraigned for judgment. Petitioner Betta was sentenced to state prison for the term prescribed by law, the sentence was suspended and he was placed on probation for a period of three years on the condition that he pay probation costs in the amount of $750 (CT 36). With respect to petitioner Ng, imposition of sentence was suspended and he was placed on two years probation on the condition he pay $500 in probation costs (CT 37).

On October 4, 1971, petitioners filed notices of appeal from the judgments and the order denying their motion to suppress evidence (CT 38; Cal. Pen. Code § 1538.5(m)). On March 29, 1973, the California Court of Appeal affirmed the judgment and the order denying petitioner's motion to suppress evidence (Petition, p. v). On April 23, 1973, the California Court of Appeal denied petitioner's petition for rehearing (Petition, p. vi). On June 20, 1973, the California Supreme Court denied petitioner's petition for hearing (Petition, p. vii). On September 18, 1973, petitioners

filed the present petition for writ of certiorari in this Court.

STATEMENT OF THE FACTS

On April 31, 1971, the San Francisco Police Department received a telephone complaint from an unidentified male caller that bookmaking activity was taking place at 2455 Polk Street, apartment 1; that telephone numbers 441-1162 and 441-1168 were those being used for the bookmaking operation; and that a possible suspect was a tall heavy set white male adult (PRT 5, 23-24).[1] Officers Bailey, Johnston, Callagy, and Mayer responded to the Polk Street address at approximately 1 p.m. (PRT 5). Johnston and Mayer stationed themselves in front of the building. Bailey and Callagy went down an alleyway next to the building, through an unlocked door characterized as the tradesmen's entrance and up one flight of a circular stairway to an exposed landing at the rear door of apartment 1 (PRT 8, 16, 23, 47; RT 1, 3, 24-26). The tradesmen's entrance allowed free access from the alleyway to the rear area of the apartment building. It and the stairway appeared to have been designed for tradesmen servicing the building, *i.e.*, public utilities employees such as Pacific Gas and Electric servicemen, garbage men, etc., and for routine deliveries (RT 24-26).

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[1] "PRT" refers to the preliminary hearing transcript of June 9, 1971. "RT" refers to the reporter's transcript of the hearing held on August 27, 1971, pursuant to petitioner's motion to suppress evidence.

Bailey stood approximately five inches from the rear door of apartment 1 and heard two males conducting over the telephone what were in his expert opinion, unlawful bookmaking activities (PRT 7-8, 17). Bailey then heard one of the suspects exit the apartment (PRT 8). Approximately a minute later, Bailey heard the voices of his partner (Johnston) and one of the suspects on the other side of the door opening onto the common hallway (PRT 8, 15). Bailey immediately opened the door and informed Johnston that he had overheard bets being taken in the premises and that Betta was one of the persons he heard in the apartment (PRT 8-9, 47, 54). Johnston promptly placed Betta under arrest (PRT 21, 54). Johnston and Mayer immediately proceeded to the front door of the apartment, knocked and announced their purpose and presence, received no response after a period of approximately one minute, and then forced the door open (PRT 9, 21, 41).

The officers found Ng sitting at a table in the bedroom (PRT 10, 33, 53). On the table were two black telephone sets, a daily bulletin known as a "scratch sheet," and documents reflecting gambling records (PRT 11-12). Bailey recognized Ng's voice as one of those he had heard in the apartment (PRT 27-31). Ng was arrested and both petitioners were advised of their constitutional rights (PRT 32, 35). Thereafter, and in response to Mayer's question why he had left the apartment, Betta stated that "it was the telephone call that didn't sound right . . . and that instead of going downstairs, if he went upstairs

. . . we would not have seen him." (PRT 36-37). While the officers were in the apartment the telephone rang several times, Johnston answered it, and the other parties placed bets with him (PRT 47-48).

The telephone call referred to by Betta apparently was placed by Johnston shortly after the officers arrived at the premises (PRT 37, 49). Approximately one-half hour after the officers arrived at the premises, Johnston and Mayer observed Betta coming out the front door of the apartment building (PRT 38, 47-48). They greeted Betta, identified themselves as police officers, advised Betta that they were making a bookmaking investigation, and asked him if he lived in the building (PRT 38). Betta stated that he did not live there but was looking for a friend who owned the building (PRT 38). When asked how long he had been in the building Betta stated he had been there approximately ten to fifteen minutes (PRT 38). Mayer told him he was lying because Mayer had been outside the building for approximately one-half hour (PRT 38). Mayer then asked Betta, "If he would accompany us back up to apartment No. 1," and Betta stated that he would (PRT 38, 40). When Betta asked if he was under arrest, Mayer replied, "No, we are on a bookmaking investigation." (PRT 40). When Betta and the officers arrived upstairs, Bailey appeared and advised Johnston that Betta was one of the persons he had heard taking wagers inside the apartment (PRT 9, 47, 54). At this point Betta was arrested.

ARGUMENT

I

BETTA'S CONTENTION THAT HE WAS UNLAWFULLY ARRESTED IS NEITHER PROPERLY BEFORE THIS COURT NOR MERITORIOUS

The basis for Betta's arrest was the identification of his voice by Officer Bailey (PRT 54). However, neither at the preliminary hearing, the hearing on the motion to suppress, nor in the first instance in the court of appeal, did Betta ever contend that the voice identification was improper or that evidence of the voice identification should be suppressed.[2] It is well established under California law that failure to raise with particularity the issue presented and the evidence to be suppressed precludes consideration of that issue on appeal. See *People v. O'Brien,* 71 Cal. 2d 394, 401-404, 79 Cal.Rptr. 313, 456 P.2d 969 (1969); *People v. Superior Court,* 274 Cal.App.2d 228, 231-232, 78 Cal.Rptr. 830 (1969); *People v. Rose,* 267 Cal. App.2d 648, 651-652, 73 Cal.Rptr. 349 (1968); see also *People v. Rogers,* 270 Cal.App.2d 705, 707-708 n. 1, 75 Cal.Rptr. 919 (1969); and *Thompson v. Superior Court,* 262 Cal.App.2d 98, 68 Cal.Rptr. 530 (1968). Failure to properly raise the issue at the trial level clearly furnishes an independent and adequate state ground for the opinion of the court of appeal, thereby precluding review here. See *Douglas v. Alabama,* 380 U.S. 415, 422 (1965); *Wolfe v. North Carolina,* 364 U.S. 177 (1960); *Newsom v. Smyth,*

[2]As he admits, this contention was raised for the first time in the court of appeal by way of his reply brief. Pet. 17.

365 U.S. 604 (1961); *Durley v. Mayo,* 351 U.S. 277 (1956); *Edelman v. California,* 344 U.S. 357 (1953); and *Stembridge v. Georgia,* 343 U.S. 541 (1952). Accordingly, as petitioners did not see fit to provide respondent with the opportunity of meeting this issue at the proper level, the contention should be disregarded.

In any event, and assuming the issue properly here, it is of no merit. Viewing the evidence most favorably to the prosecution, as this Court must, the record amply reflects that Betta consented to go with Officer Mayer up to the apartment. See PRT 38, 40. No improper assertion of authority was made which compelled Betta to accompany the officers. *Cf. Bumper v. North Carolina,* 391 U.S. 543 (1968). Rather, the officer's testimony reflects that Betta went "of his own free will" after the officers identified themselves, told him of the reason for their presence, and asked him to accompany them back to the apartment (PRT 38, 40). Although the officers may have required him to accompany them had he refused to do so (PRT 40), they were not confronted with that situation. Accordingly, although the court of appeal did not rely on those facts in its opinion, it certainly was not precluded from doing so and, certainly had that issue been properly put before them, they could have denied relief on this ground also.

Secondly, and as the court of appeal pointed out (Petition, pp. iv-v), the record does not reflect that Betta was arrested when initially confronted by the officers. At that point they had made no decision

whether to take him into custody. However, they did have sufficient information and cause to detain Betta.

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. . . ." *Adams v. Williams,* 407 U.S. 143, 145-146 (1972). *Accord, Terry v. Ohio,* 392 U.S. 1, 22 (1968); and *People v. Mickelson,* 59 Cal.2d 448, 450-451, 30 Cal.Rptr. 18, 380 P.2d 658 (1963).

Here, as the court of appeal pointed out, the officers had a more than adequate basis upon which to detain Betta for questioning as he left the apartment building. Consider the following: (1) Betta was observed leaving the apartment building at the time the officers knew unlawful gambling activities were taking place therein. (2) When observed he was only a short distance from the alleged unlawful gambling activities. (3) He was observed leaving the building only one minute after Officer Johnston had telephoned the bookmakers. (4) He denied living in the building and gave the officers a patently false answer in response to their questions after he had been advised that a gambling investigation was underway. Surely such circumstances would have indicated to a reasonable man in a like position that a temporary detention until more information could be obtained was

necessary to the proper discharge of his duties. *Adams v. Williams, supra; People v. Manis,* 268 Cal.App.2d 653, 658-659, 74 Cal.Rptr. 423 (1969). Accordingly, it is submitted that the few seconds it took the officers and Betta to travel the few feet upstairs to the apartment was only a slight restraint on Betta's liberty of movement, and therefore entirely reasonable under the circumstances. *Terry v. Ohio, supra,* 32-33 (1968).

Fourthly, and even assuming Betta's detention unlawful, the voice identification evidence should not have been suppressed. It was not derived by any *exploitation* of that detention. *Wong Sun v. United States,* 371 U.S. 471, 485, 487-488 (1963). See also *Lockridge v. Superior Court,* 3 Cal.3d 166, 170-171, 89 Cal.Rptr. 731, 474 P.2d 683 (1970); and *People v. Johnson,* 70 Cal.2d 541, 546, 75 Cal.Rptr. 401, 450 P.2d 865 (1969). Betta was simply overheard conversing with the officers who had done nothing more than escort him to the suspect apartment. It appears mere coincidence that Officer Bailey overheard Betta's voice in the hallway as they approached.

Finally, the voice identification evidence should not have been suppressed because it was something the officers would have secured regardless of whether they had arrested Betta at the door to the building or not. See *Lockridge v. Superior Court, supra; People v. Stoner,* 65 Cal.2d 595, 602 n. 3, 55 Cal.Rptr. 897, 422 P.2d 585 (1967); *United States v. Seohnlein,* 423 F.2d 1051, 1053 (4th Cir. 1970), *cert. denied,* 399 U.S. 913; *Wayne v. United States,* 318 F.2d 205, 209 (D.C. Cir. 1963); *Somer v. United States,* 138 F.2d 790, 792 (2d

Cir. 1943). See also Annotations, 43 A.L.R.3d 385, 404-406 (1972). Here the officers were aware of Betta's identity when he produced his driver's license at the outset of the preliminary investigation and was recognized by Officer Johnston (PRT 51). That the officers would not have later sought him out had he not been arrested at that particular moment is certainly an unreasonable conclusion. And clearly, that interview would have resulted in his identification as one of the suspects. Accordingly, as this evidence would have been developed regardless of whether Betta was arrested then or later, it is submitted he has suffered no prejudice thereby and therefore the evidence should not be suppressed. *Wong Sun v. United States, supra.*

II

THE OVERHEARING OF PETITIONERS' CONVERSATIONS WITHIN THE APARTMENT DID NOT VIOLATE THEIR REASONABLE EXPECTATION OF PRIVACY

The record reflects that Inspector Bailey stood approximately five inches from the rear door of the apartment and overheard petitioners negotiating gambling transactions. No contention is made by petitioners that the officers were in a place where they were not entitled to be. Nor would such a contention be valid. In this respect, and as we have noted in our statement of facts, *supra,* the record reflects that the area where Bailey was standing appears to have been open to the public. Bailey was standing on the exposed landing of the first floor stairwell on the outside

rear of the building. This landing opened into the first floor hallway, which could be entered simply by opening an unlocked door separating the two. Access to the stairwell and landing was gained by simply walking down an alley, through an unlocked door, and up the stairs. It appears that anyone could approach the premises as properly by this means as by going to the front door. The only possible distinction being that this means of access was less formal and therefore probably was intended for use by employees or other persons providing goods or services to the occupants, as opposed to the formalities accorded invited guests. Certainly, there was no greater expectation of privacy intended with respect to that exposed outside landing than would normally be accorded the common hallway inside.

What petitioners do argue is that their conversations within the apartment were entitled to constitutional protection because they intended those conversations to be private. They rely on *Katz v. United States,* 389 U.S. 347 (1967). However, that reliance is misplaced. As the opinion of the court of appeal points out, it is indeed well established that the overhearing of a conversation under circumstances such as these, just as is the making of observations through open windows from a proper vantage point, does not constitute a search, invade any reasonable expectation of privacy, and is therefore not prohibited by the Fourth Amendment. See *United States v. Wilkes,* 451 F.2d 938, 941, n. 6 (2d Cir. 1971); *United States v. Fuller,* 441 F.2d 755 (4th Cir. 1971);

Ponce v. Craven, 409 F.2d 621, 625 (9th Cir. 1969); *United States v. Llanes,* 398 F.2d 880, 883-884 (2d Cir. 1968); and *United States v. Perry,* 339 F.Supp. 209, 213 (S. D. Cal. 1972), wherein the court commented:

> "The general rule is that information obtained by an officer using his natural senses, where the officer has a right to be where he is, is admissible evidence. The fact that the information is in the form of conversations emanating from a private space, such as a hotel room, is not a bar to its admissibility. [Citation omitted.] Furthermore, the fact that it may be necessary to place one's ear against a door in order to comprehend the conversations inside a room does not make the search unlawful. [Citation omitted.]" See also *People v. Bradley,* 1 Cal.3d 80, 81 Cal.Rptr. 457, 460 P.2d 129 (1969); *People v. Berutko,* 71 Cal 2d 84, 91, 77 Cal.Rptr. 217, 453 P.2d 721 (1969); *People v. Terry,* 70 Cal.2d 410, 427, 77 Cal.Rptr. 460, 454 P.2d 36 (1969), *cert. denied,* 399 U.S. 911; *People v. Martin,* 45 Cal.2d 755, 761-762, 290 P.2d 855 (1955); *People v. Guerra,* 21 Cal. App.3d 534, 538, 98 Cal.Rptr. 627 (1971); *Hart v. Superior Court,* 21 Cal.App.3d 496, 505, 98 Cal. Rptr. 565 (1971); *People v. Foster,* 19 Cal.App. 3d 649, 653, 97 Cal.Rptr. 94 (1971); *People v. Colvin,* 19 Cal.App.3d 14, 20, 96 Cal.Rptr. 397 1971); *People v. Seals,* 263 Cal.App.2d 575, 577, 69 Cal.Rptr. 861 (1968).

Thus, the short answer to petitioners' argument is that regardless of whatever their personal intentions may have been, the fact they spoke loudly and clearly enough to be heard by persons standing outside their

apartment in a place where those persons had a right to be clearly precludes that speech from constitutional protection. It is therefore submitted the police officers properly overheard their unlawful activities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated, December 18, 1973.

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